86-289

No. _____

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In The

Supreme Court of the United States

October Term, 1986

J. C. EALEY, JR., Deceased,
DAISEY EALEY, Personal Representative, et al.,
Petitioners,

v.

THE CITY OF DETROIT,
and COMMANDER PHILLIP ARREOLA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

– AND APPENDIX –

GARY EDWARD GARDNER
Counsel of Record
29444 Northwestern Highway,
Suite 300
Southfield, Michigan 48034-1038
(313) 350-9110

Counsel for Petitioners

August 19, 1986

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-8745

59 pp

QUESTIONS PRESENTED

I.

WHETHER PRECLUDING PARENTS OF ADULT CHILDREN FROM BRINGING A 42 U.S.C. SEC. 1943 ACTION, BUT ALLOWING PARENTS OF MINOR CHILDREN TO BRING SUCH ACTIONS, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

II.

WHETHER OVERRULING THE SPECIFIC FACTUAL FINDING OF A JURY IS A DENIAL OF DUE PROCESS, AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

LIST OF PARTIES

The plaintiffs in the proceedings below were the Petitioners, J. C. Ealey, Jr., Deceased, Daisey Ealey, Personal Representative, and Daisey Ealey and J. C. Ealey, Sr., individually. The defendants below were The City of Detroit, Commander Phillip Arreola, Police Officer Patrick Fitzgerald and The Detroit Police Department.

The Petitioners here are identical to the plaintiffs below. The Respondents before this Court are The City of Detroit and Commander Phillip Arreola. Police Officer Patrick Fitzgerald was found to be not responsible by the jury and The Detroit Police Department was held by the trial court not to be an entity capable of being sued.

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II. WHETHER OVERRULING THE SPECIFIC FACTUAL FINDING OF A JURY IS A DENIAL OF DUE PROCESS, AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

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No. _____

In The

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J. C. EALEY, JR., Deceased,
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Petitioners,

v.

THE CITY OF DETROIT,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

The Petitioners, J. C. Ealey, Jr., Deceased, Daisey Ealey, Personal Representative, and Daisey Ealey and J. C. Ealey, Sr., respectfully pray that a Writ of Certiorari issue to review the order of the Supreme Court of the State of Michigan, dated May 28, 1986, affirming the Opinion and Order of the Court of Appeals for the State of Michigan entered in the above-entitled proceeding.

OPINIONS BELOW

The Order of the Supreme Court of the State of Michigan, dated May 28, 1986, affirming its March 28, 1986 Order is not reported. It, and the March 28, 1986 Order are reprinted in the appendix hereto, pages A-1 and A-2, *infra*.

The Order of the Court of Appeals of the State of Michigan is reported at 144 Mich App 324; 375 NW 2d

435 (1985), and is reprinted in the appendix hereto, page B-1, *infra*.

The Judgment and Opinion of the Circuit Court for the County of Wayne have not been reported; they are reprinted at pages C-1 and C-3 in the appendix hereto.

JURISDICTION

Invoking the protection of the United States Constitution, including the right to Due Process, in the Plaintiffs-Petitioners' amended complaint, the trial court awarded Plaintiffs-Petitioners a Judgment under the provisions of 42 U.S.C. Sec. 1983. *See* the Judgment of the Circuit Court for the County of Wayne, and the Opinion of the Court, pages C-1 and C-3.

On Defendants-Respondents' appeal, the Court of Appeals of the State of Michigan, on July 16, 1985, entered a Judgment and an Opinion reversing the Judgment of the Circuit Court for the County of Wayne. In so doing, the Court of Appeals overruled a specific finding of fact by the trial court jury that one of the police officers acted in bad faith.

The Michigan Court of Appeals denied Plaintiffs-Petitioners the equal protection of the law by ruling that parents of an adult child do not have a constitutionally protected right to the continued life of their child, while ruling that the parents of a minor child would have a constitutionally protected right to the continued life of their child.

Petitioners sought to appeal the decision of the Michigan Court of Appeals in the Supreme Court for the State of Michigan. That Court denied the application by a vote of five to two on March 26, 1986. A Motion for

Reconsideration of that Order was denied by the Michigan Supreme Court on May 28, 1986.

The jurisdiction of this Court to review the Orders and Judgment of the courts of the State of Michigan is invoked under 28 U.S.C. Sec. 1957(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

- U.S. Const. amend. XIV

  > No state . . . shall . . . deny to any person within its jurisdiction the equal protection of the laws.
  >
  > . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . .

- 42 U.S.C. Sec. 1983

  > Every person who, under color of any statute . . . of any state . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT OF THE CASE

At approximately seven o'clock in the morning on December 11, 1979, J.C. Ealey, Jr., approached Audrey Spears, who was walking on Seebaldt Street in the City of Detroit, Michigan. Mr. Ealey informed Mrs. Spears that "Someone is following me." At the time, Mr. Ealey was carrying a .22 caliber bolt action rifle, later determined to have one .22 caliber long shell in the chamber.

Mrs. Spears walked up the stairs to the porch of the house located at 5251 Seebaldt. Mr. Ealey followed her onto the porch, but did not follow her into the home. After entering the house, Mrs. Spears called the emergency operator and indicated that there was a man with a gun on the porch of the house. Meanwhile, Mr. Ealey took up a position on the porch with his gun pointed toward the outside door.

Commander Phillip Arreola, one of the principal defendants in this case, was on his way to work at the 6th Detroit Police Precinct and heard the broadcast report of a man with a gun. The commander responded to the scene. After arriving, the commander, together with Defendant, Officer Patrick Fitzgerald, entered the home from the rear and evacuated the occupants from the building.

The two officers then took up positions inside the house, where they could observe Mr. Ealey on the porch. The porch of the house is approximately eight feet wide by sixteen feet long. Officer Fitzgerald positioned himself at the side of the living room, nearest to Mr. Ealey, and the commander stood near the front door to the house, approximately ten to twelve feet from Mr. Ealey. From their vantage points, the two officers had an opportunity to observe Mr. Ealey clearly.

By the time the house had been secured by Arreola and Fitzgerald, six police cars, with a total of approximately ten officers, had arrived on the scene. At this point Mr. Ealey was "contained," and over his portable radio, Commander Arreola issued an order for his men to maintain "maximum cover." None of the police cars on the scene was equipped with a shotgun or tear gas equipment; therefore, the commander elected to call for a "gun car."

The procedures of The Detroit Police Department require officers to communicate with a "barricaded gunman" after the subject has been contained, but the commander and Officer Fitzgerald did not communicate at all with Mr. Ealey. For approximately twenty minutes, they only observed him. From their positions, the officers could watch Mr. Ealey in safety and could see each other inside the living room of the house.

For some unknown reason, Mr. Ealey decided to stand, apparently to look into the street. When he saw Mr. Ealey start to rise, Commander Arreola opened the door to the porch, and, in violation of departmental policy, left the safety of the living room (and the sight of Officer Fitzgerald) by stepping out onto the porch. He then ordered Mr. Ealey to "drop your gun."

Upon hearing the sound of the voice, Mr. Ealey began to turn toward his left, and as a result, his gun, which had been pointed toward the street, was turning in the direction of the commander. Commander Arreola, who was now on the porch, was now confronted with the decision to shoot or not to shoot. He shot. From a distance of approximately four to six feet, Officer Fitzgerald also shot at Mr. Ealey, after he observed Mr. Ealey begin to turn in the direction of his commander.

The officers had Mr. Ealey in an effective cross-fire and both police officers emptied their guns, Commander Arreola emptied his five-shot revolver and Officer Fitzgerald emptied his six-shot revolver.

Evidence introduced at trial indicated that the first shots from the commander began to spin Mr. Ealey away from the commander and that Mr. Ealey fell to the floor while the officers were still shooting. Mr. Ealey fell in a direction facing away from the commander. Additional evidence introduced at trial also indicated that one

of the shots entered Mr. Ealey's buttocks area, travelled upwards through his body, and exited through his chest. That bullet was imbedded in the floor of the porch under where Mr. Ealey was lying.

After the shooting ceased, it was determined that Mr. Ealey was still alive. An ambulance was called and Mr. Ealey was transported to a local hospital where he died approximately two hours later. Mr. Ealey's gun had not been fired.

Plaintiffs filed suit alleging, among other things, violation of the decedent's constitutional rights to Due Process and filed claims for loss of life on behalf of the estate, and for losses sustained by the parents, in their individual capacities.

During trial, Defendants' Motion for Directed Verdict was denied in part and granted in part. The Court denied the Motion with regard to an intentional tort claim, which the Court found to have been adequately pled. The Court also found that the civil rights claims were adequately pleaded; however, the Court granted a directed verdict on a breach of contract claim and on a claim against the City for negligence for failing to properly train and supervise.

An issue as to whether or not the individual officers could be held liable, under the Michigan Governmental Immunity Statute, was decided in favor of Plaintiffs-Petitioners.

In a special verdict question, the jury specifically found that Commander Arreola had acted in bad faith and that Officer Fitzgerald had acted in good faith. The jury awarded Plaintiffs Two Hundred and Forty Thousand Dollars ($240,000.00) on their civil rights claim and awarded Ten Thousand Dollars ($10,000.00) on Plaintiffs' assault and battery claim.

On August 16, 1983, a Judgment in favor of Plaintiffs was entered by the Court for a total of $379,863.00.

Twenty-one days later, one day after the twenty-day appeal-of-right period had expired, Defendants-Respondents filed a Motion for New Trial or for Judgment Notwithstanding the Verdict. Later that same day, they filed a Motion to have the late Motion heard.

On November 18, 1983, the Motion to have the late Motion heard was granted, and, on the same day, the trial judge denied the Motion for New Trial or for Judgment Notwithstanding the Verdict on the merits.

Defendants-Respondents filed an Application for Delayed Appeal in the Michigan Court of Appeals on December 7, 1983. A timely answer was filed and the Court of Appeals ultimately granted the Application for Delayed Appeal.

Briefs were submitted by both sides and oral arguments were heard by the Michigan Court of Appeals on April 17, 1985. On July 16, 1985, that Court entered its Order reversing the decision of the trial court with regard to the Motion for Directed Verdict heard during the trial, and also specifically reversed the findings of fact of the jury which found bad faith on the part of Commander Arreola.

The Michigan Court of Appeals also ruled that the parents of an adult child have no constitutionally protected rights for the continued life of their adult child under 42 U.S.C. Sec. 1983.

Thereafter, a timely Application for Leave to Appeal was filed in the Supreme Court for the State of Michigan, and on March 26, 1986, that Court voted five to two to deny Plaintiffs-Petitioners' Application for Leave to Appeal. A Motion for Reconsideration of that decision was denied by the Supreme Court on May 28, 1986.

REASONS FOR GRANTING THE WRIT

I.

PRECLUDING PARENTS OF ADULT CHILDREN FROM BRINGING A 42 U.S.C. SEC. 1943 ACTION, BUT ALLOWING PARENTS OF MINOR CHILDREN TO BRING SUCH ACTIONS, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The Michigan Court of Appeals' ruling that parents of an adult child do not have constitutional rights to the continued life of their child, is a denial of equal protection, where the same Court ruled that parents do have a constitutionally protected right in the life of a minor child.

The Michigan Courts have directly contravened the ruling of this Court in *Stanley* v *Illinois*, 405 US 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972), by ruling that parents do not have the constitutionally protected right to the life of their child, solely because that child has attained the age of majority. The Michigan ruling delineating parental rights, based on the age of the child, will have a drastic impact on future cases. The decision deserves the attention of this Court. The Lower Court's reasoning that the age factor is the key distinction in denying Daisey and J. C. Easley, Sr., a cause of action, is not correct. In *Bell* v *City of Milwaukee*, 746 F. 2d 1205 (7th Cir. 1984), the decedent was twenty-three years old. The Court held that Mr. Bell's parents did have a right to bring an action under 42 U.S.C. Sec. 1983. The *Bell* Court was not persuaded that a constitutional line should be drawn based solely on the age of the child. The *Bell* Court cited *Stanley* v *Illinois*, saying, "The Supreme Court decisions protect more than the custody dimension of the parent-child relationship. A protected

relationship includes the parents' interest in the companionship, care, custody and management of the child." *Bell*, 764 F. 2d at 1245.

The Michigan Court relied on two cases. *Jackson* v *Marsh*, 551 F. Supp. 1091 (D. Colo. 1982) and *White* v *Talboys*, 573 F. Supp. 49 (D. Colo. 1983).

The Michigan Court of Appeals made a distinction, based on the fact that J. C. Ealey, Jr., was an adult child. In *Ealey* v *City of Detroit*, 144 Mich App 324, 375 NW 2d 435 (1985), the Court cited with approval, *White* and *Jackson*, saying, "Plaintiffs' claim for relief based on a constitutional deprivation of their own rights due to their son's death are dismissed. The right to the continued life of an offspring is not a cognizable constitutional claim under Section 1983." *Id.*, at 338, 339.

The Michigan Court went on to say, "Thus, the parents had no right to an award under the Civil Rights Statute for the death of their son under the facts of that case." *Id.*, at 339.

The *Ealey* panel overlooked the arguments of *Bell*, where the Court cited *Lassiter* v *Department of Social Services*, 425 US 18, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (1981); *Little* v *Streater*, 452 US 1, 68 L. Ed. 2d 627, 101 S. Ct. 2202 (1980); *Smith* v *Organization of Foster Families*, 431 US 816, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1976), saying, "The due process clause requires that severance in the parent-child relationship caused by the State occur only with rigorous protection for the individual liberty interest at stake." *Bell*, 746 F. 2d at 1243, 1244.

Bell continues, saying, "The continued interest in the care and companionship of a child is afforded due process protection where the parent raised and nurtured the child . . ." *Bell, supra*, at 1245.

This reasoning is fundamental to civil rights issues of the present case. There is more to a parental relationship than raising a child to the age of eighteen. As the *Bell* Court observed, the parent has the right to the continued existence of the parent-child relationship. The parent has the right to receive visits from his child and has the right to maintain a continuing relationship with his or her child. *Bell* points out facts which have great similarity to the present case. In *Bell*, the decedent was single and had no children. He had not become a part of another family unit; his father's family was his immediate family.

In this case, the deprivation was far more substantial than an unlawful removal of a child from a parent's custody; it was the annihilation of the parent-child relationship. In *Bell*, the jury was fully aware that the decedent was no longer a minor, and it was appropriate for them to consider that fact in assessing the damages awarded to the parents for the loss of his society and companionship. *Id.*, at 1245. The decedent's age and separate residence were matters for the jury to consider when determining damages. They were not a bar to recovery.

Petitioners believe that the age of the decedent alone should not alone preclude damages, but should merely be considered as a factor in assessing the amount of the damages.

The *Ealey* Court's reliance upon *White*, and *Jackson*, as support for its Opinion, is unsound. Those cases have been interpreted as being in conflict with this Court's holdings. *See Kelson* v *City of Springfield*, 767 F. 2d 651 (9th Cir. 1985), which found that a parent does have Sec. 1983 rights to sue for the loss of the parent-child rela-

tionship. The *Kelson* Court quoted the words of this Court, saying:

> This Court's decisions have, by now, been made plain beyond the need for multiple citations that a parent's desire for and right to the companionship, care, custody and management of her children is an important interest that undeniably warrants deference and, absent of powerful countervailing interests, protection.
>
> *Kelson*, 767 F. 2d at 654.

The *Kelson* Court not only reinforced the high protection granted to parent-child relationships, but also strongly attacked the cases that the *Ealey* panel relied upon. The *Kelson* Court indicated that the *Kelson* defendants' contention that parents did not have constitutionally protected rights to the companionship and protection of their children was incorrect. The *Kelson* defendants were relying upon *White* and *Jackson*.

The *Ealey* Court has created a constitutionally impermissible distinction. It is a precedent directly at odds with the Equal Protection Clause of the United States Constitution and contravenes Circuit and District Court rulings regarding the constitutional rights of parents to the continued life of their offspring.

Consideration of this matter by this Honorable Court is essential.

II.

OVERRULING THE SPECIFIC FACTUAL FINDING OF A JURY IS A DENIAL OF DUE PROCESS, AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The Appeals Court's overruling a specific factual finding of a jury is a denial of the Due Process of laws requirements of the United States Constitution, especially where the actions of the defendant officer themselves work to the denial of Due Process. The Due Process Clause, like its forebearer in the Magna Carta was "intended to secure the individual from the arbitrary exercise of the powers of government." *Hurtado* v *California*, 110 US 516, 28 L. Ed. 2d 232, 4 S. Ct. 111 (1884), *quoting Bank of Columbia of the Okely* v *Wheats*, 17 US 235, 4 L. Ed. 559 (1819). *See also Wolff* v *McDonnell*, 418 US 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974).

"The touchstone of Due Process is protection of the individual against arbitrary action of government, *Dett* v *West Virginia*, 129 US 114, 32 L. Ed. 623, 9 S. Ct. 231 (1889)"; *Parratt* v *Taylor*, 451 US 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981).

By requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, the Due Process Clause promotes fairness in such decisions. By barring certain government actions, regardless of the fairness of the procedures used to implement them, it serves to protect governmental power from being "used for purposes of oppression." *Murray's Lessee* v *Hoboken Land and Improvement Co.*, 59 US 272, 15 L. Ed. 372 (1856).

The Michigan Court of Appeals, after reviewing the trial transcript, concluded that there was insufficient evidence to support the jury's decision of bad faith, despite

the fact that a specific finding of bad faith was made by the jury.

The Court cited *Kupkowski* v *Avis Ford*, 395 Mich 155, 235 NW 2d 324 (1975), but used the case without accurately applying the standard enunciated therein. *Kupkowski* requires that:

> All of the evidence [is to] be considered in the light most favorable to the Plaintiff. Upon review, if any competent and sufficient evidence supports the jury determination, it should not be disturbed.
>
> *Id.*, at 167.

Rather than applying the proper standard, the Michigan Court of Appeals panel chose to ignore facts that supported the jury's verdict. In *Caldwell* v *Fox*, 394 Mich 401, 231 NW 2d 46 (1975), the Court, in reviewing a negligence case, stated that:

> At the outset we reiterated a well established principle of law: A jury, not the trial judge, is the trier of fact. Wherever a fact question exists, upon which reasonable persons may differ, a trial judge may not direct a verdict.
>
> *Id.*, at 407.

In *Detroit and Milwaukee Railroad Co.* v *Van Steinburg*, 17 Mich 99 (1868), the Court stated:

> [The Plaintiff] had a right to ask the jury to believe the case as he presented it; and, however improbable some portions of his testimony may appear to us, we cannot say that the jury might not have given it full credence. It is for them, and not for the court, to compare and weigh the evidence.
>
> *Caldwell*, 394 Mich at 407.

The wisdom of the rule is that a jury has a first-hand opportunity to assess the demeanor and veracity of the witnesses, while the Court of Appeals reads from a lifeless transcript. This fundamental principle of law has been upset by the Michigan Court of Appeals by overruling the Circuit Court Judge's decision on the defendants' Directed Verdict Motion. The Court of Appeals disregarded the constitutional standard established in Michigan by *Riste* v *Helton*, 139 Mich App 404, 32 NW 2d 300 (1984).

In reviewing the granting or denying of a Motion for a Directed Verdict, a court is required to view the evidence, and all legitimate inferences drawn from that evidence, in a light most favorable to the non-moving party.

That standard has been applied and reinforced by Michigan courts in numerous cases. *See Obey* v *McFadden Corp.*, 138 Mich App 767, 360 NW 2d 298 (1984); *Nelson* v *Detroit Automobile Inter-Insurance Exchange*, 137 Mich App 226, 359 NW 2d 536 (1983); *Ransford* v *Detroit Edison*, 124 Mich App 537, 335 NW 2d 211 (1983).

In the present case, the Court of Appeals did not apply the proper standard of review. The Court did not view the evidence, and all inferences that should have been drawn from that evidence, in the light most favorable to the plaintiffs as is required in the State of Michigan and by the United States Constitution.

The panel never considered whether, or how, reasonable men might differ on the issue of good faith. The panel concluded that there was only evidence of good faith in a trial transcript and ignored the jury's specific factual finding that Defendant Arreola acted in bad faith. By doing so, the Court of Appeals has invaded the province of the jury, by using an improper standard of review, and has violated the plaintiffs' right to Due Process

of Law. In examining the evidence the jury did find bad faith on the commander's part. However, the Appeals panel asked:

> When did Arreola fail to act in good faith? Did he fail to act in good faith when he pulled the trigger on his service revolver?
>
> *Ealey*, 144 Mich App at 333.

The jury might not have concentrated on the moment Arreola made his command decision to enter the house, or even the decision to go out onto the porch to confront Mr. Ealey. They could have considered the moment Arreola first pulled the trigger, or the moment when the commander pulled the trigger for the fifth time, which was at a point when Mr. Ealey was no longer a threat to the commander or to any other person and was, in fact, laying face down on the porch, facing away from the commander. By making the determination that there was no point at which the jury could have found bad faith, the panel violently upset the entire jury system.

It is respectfully submitted that members of the panel allowed their personal biases or prejudices to influence their decision. One of the members of the panel, Judge Roman S. Gribbs, is the former police commissioner and mayor of the City of Detroit.

The Court of Appeals did not examine the evidence in a light most favorable to the plaintiffs. The panel conveniently ignored certain facts. What the panel did was to examine the evidence in the light most favorable to the defendants.

The actions of the Michigan courts have created a constitutionally impermissible exception to the jury system established in the very earliest stages of this country's

history. In Michigan, no longer is the jury the final arbiter of facts; the jury's decision may be reviewed in a capricious and arbitrary fashion by Appeals panels who, by substituting their own biases and by succumbing to political pressure and influence, distort the function of the jury and the entire judicial system.

Therefore, Petitioners ask that this Honorable Court review and reverse the decisions of the Michigan courts.

CONCLUSION

For these reasons, this Petition for Certiorari should be granted. If the Petitioners are correct in their assertion that the distinction between the rights of the parents of adult children and the rights of parents of minor children are constitutionally indistinguishable, this Court should reverse the Judgment and Orders of the Michigan courts and reinstate the Judgment of the trial court.

The Court should protect Petitioners' Due Process rights by reinstating the jury's specific finding of bad faith on the part of Commander Arreola and reversing the factual decision of the Michigan Court of Appeals.

Respectfully submitted,

By: /s/ GARY EDWARD GARDNER
Counsel of Record
29444 Northwestern Highway,
Suite 300
Southfield, Michigan 48034-1038
(313) 350-9110

Counsel for Petitioners

Dated: August 19, 1986

APPENDIX TO PETITION FOR CERTIORARI

• • •

APPENDIX A

ORDER DENYING MOTION FOR RECONSIDERATION

(State of Michigan — Supreme Court)

(Certified May 28, 1986)

(J. C. EALEY, JR., Deceased, DAISEY EALEY, Personal Representative, and DAISEY EALEY, and J. C. EALEY, SR., individually, Plaintiffs-Appellants, v CITY OF DETROIT, COMMANDER PHILLIP ARREOLA, POLICE OFFICER PATRICK FITZGERALD, and DETROIT POLICE DEPARTMENT, jointly and severally, Defendants-Appellees — SC: 77045; COA: 75369; LC: 80-009-557)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 28th day of May in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable:
G. MENNEN WILLIAMS, Chief Justice; CHARLES L. LEVIN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, DOROTHY COMSTOCK RILEY, DENNIS W. ARCHER, Associate Justices.

On order of the Court, the motion for reconsideration of this Court's order of March 26, 1986 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Levin, J., would grant the motion for reconsideration and leave to appeal.

(*Certification Omitted*)

ORDER DENYING LEAVE TO APPEAL AND MOTION TO STRIKE

(State of Michigan — Supreme Court)

(Certified March 26, 1986)

(J. C. EALEY, JR., deceased, DAISEY EALEY, Personal Representative, and DAISEY EALEY, and J. C. EALEY, SR., individually, Plaintiffs-Appellants, v CITY OF DETROIT, COMMANDER PHILLIP ARREOLA, POLICE OFFICER PATRICK FITZGERALD, and DETROIT POLICE DEPARTMENT, jointly and severally, Defendants-Appellees — SC: 77045; COA: 75369; LC: 80-009-557)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 26th day of March in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable:
G. MENNEN WILLIAMS, Chief Justice; CHARLES L. LEVIN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, DOROTHY COMSTOCK RILEY, DENNIS W. ARCHER, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

The motion to strike is also considered and it is DENIED.

Levin and Archer, JJ., would grant leave to appeal.

(Certification Omitted)

APPENDIX B

OPINION

(State of Michigan — Court of Appeals)

(Filed July 16, 1985)

(J. C. EALEY, JR., Deceased, DAISEY EALEY, Personal Representative, and DAISEY EALEY and J. C. EALEY, SR., Individually, Plaintiffs-Appellees, Cross-Appellants, v CITY OF DETROIT, COMMANDER PHILLIP ARREOLA, POLICE OFFICER PATRICK FITZGERALD, and DETROIT POLICE DEPARTMENT, Defendants-Appellants, Cross-Appellees — No. 75369)

BEFORE: R. S. Gribbs, P.J.,
T. M. Burns and R. B. Martin*, JJ.

PER CURIAM *FOR PUBLICATION*

A police officer's confrontation with an armed civilian has resulted in the death of the civilian and a lawsuit by the decedent's estate and his parents against the City of Detroit, the Detroit Police Department, and two officers.

On December 11, 1979, shortly after 7 a.m., Audrey Spears carried her four-month-old baby as she walked to a residence on Seebaldt Street in Detroit. As she approached the residence, a man later identified as J. C. Ealey, Jr. came toward her from the side of the house. He pointed a rifle directly at her and waved it back and forth as he said someone was after him. When Spears was let into the house, she closed the front door, leaving Ealey, Jr. on the enclosed front porch with the rifle. She saw Ealey lying on the porch up against the wall with

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* Retired Circuit Court Judge sitting on the Court of Appeals by assignment.

the gun pointed toward the front door. She called the police. Officers Fitzgerald and Dessinger arrived at the scene and used a flashlight to see the gunman on the porch who pointed the gun directly at them. They radioed for assistance. Commander Arreola arrived shortly, talked to the officers and went to the rear of the house where he was met by an hysterical Audrey Spears. He instructed the occupants of the house to leave by the back alley. He went to the front window and saw Ealey, Jr. on the porch with a rifle in a ready position aimed at the front door. Commander Arreola had Officer Fitzgerald come into the house through the back door and issued an order for maximum cover for all other responding units. Arreola took up a position near the front door where he could see the gunman through a living room window and Fitzgerald was in the same room at another window where he could likewise see Ealey. Mr. Ealey, to the east of the front door, had his gun up to his shoulder aimed westerly toward the front door. Arreola radioed for a car he knew would have a shotgun, tear gas equipment, bulletproof vests, and a bullhorn. While the police were awaiting the arrival of this unit, Ealey, Jr. partially stood up and pointed the weapon towards the street. Commander Arreola testified he feared the gunman was going to fire at policemen or civilians who might be on the street, so he opened the front door to distract him. Arreola yelled, "Police, drop your gun." Fitzgerald testified Arreola also said, "You have one gun at your back and one gun at your side. Drop your gun."

Ealey, Jr. turned towards Commander Arreola and pointed his loaded rifle at him. Fitzgerald heard the order and saw Ealey turn and aim his rifle in the direction of his commander. He feared for the Commander's life so he broke the front window pane and rapidly fired six shots. Arreola, seeing a rifle pointed at him from five to eight feet away, fired five rapid shots at Ealey at the

same time Fitzgerald was firing. Some of the shots apparently struck Ealey after he was lying on the porch. All the shooting occurred in a matter of one or two seconds. An ambulance was summoned by radio and arrived within a few minutes and transferred Ealey to Ford Hospital where he died of these wounds.

Ealey's parents and his estate sued Arreola, Fitzgerald, the Detroit Police Department, and the City of Detroit. From answers to special questions given to the jury, the court awarded a judgment of $10,000 for the estate against Arreola and the City of Detroit on an assault and battery charge, and the parents were awarded $240,000 against Arreola on the civil rights claim. The jury found Arreola was negligent in confronting decedent but specifically found no damages arising from this negligence. Interest was added to these amounts together with $3,700 attorney fees, and $957.15 costs for the defendents' rejection of a mediation award, and $10,441.24 attorney fees under the civil rights act.

The City and Arreola have appealed and the plaintiffs cross-appeal on the basis of the court's directing a verdict against them on their claim the City of Detroit violated plaintiffs' constitutional rights by having a policy of providing first aid only by calling emergency medical service. Plaintiffs further claim the trial court had no jurisdiction to hear the defendents' motion for a new trial or a judgment notwithstanding the verdict because it was filed 21 days after the judgment was entered.

Appellants claim reversible error in the court's instructing the jury regarding Arreola's defense of self-defense. The court instructed:

> "With regards to the defense of self-defense, the defendant, Commander Arreola, has the burden of proof on the following elements:

"1. That he believed that he was in danger of immediate death or serious bodily injury.
"2. That the belief was reasonable.
"3. That the degree of force used in the defense of self appeared to be reasonably necessary."

The record indicates the defendants did not object to this instruction. Absent manifest injustice, this Court is precluded from reviewing the alleged error. GCR 1963, 516.2, *People* v *Small*, 120 Mich App 442; 327 NW2d 504 (1982). Although this is a civil case, each side has cited criminal cases to bolster its respective position. Appellant claimed the test is what the defendant "honestly" or "truly" believed and not what a reasonable belief would be under the circumstances. He relies on *People* v *Burkard*, 374 Mich 430; 132 NW2d 106 (1965), and *People* v *Robinson*, 79 Mich App 145; 261 NW2d 544 (1977). We believe the more recent case of *People* v *Doss*, 406 Mich 90, 102; 276 NW2d 9, 14, (1979), controls. There the Court ruled:

> "However, like the private citizen, the police officer who claims self-defense must have *reasonably* believed himself to have been in great danger and that his response was necessary to save himself therefrom." (Emphasis in original.)

In any event, considering the whole of the trial, there is no manifest injustice arising from the instruction given.

Appellants allege the verdicts must be set aside because they were inconsistent. In answering special questions, the jury decided Officer Fitzgerald had a right to defend the Commander but that the Commander had no right to defend himself under the exact same circumstances. *If* from the evidence in the case the jury had a right to determine Fitzgerald was blameless in determining to act in defense of his commander although the commander him-

self was not properly acting in self-defense, the verdicts were not reversibly inconsistent.

Appellants claim the trial court erred in not granting a directed verdict and in not granting a judgment notwithstanding the verdict based on the uncontroverted evidence. Appellants further claim a right to reversal because of the qualified good faith immunity of defendant Arreola. *Harris* v *Pirch*, 677 F2d 681 (CA 8, 1982). This Court considers these claims with some trepidation and ambivalence. Our society is more and more critical of courts because it feels the judicial system too often supports the person committing crimes and dramatically fails to support the victims of crime and the police in their attempts to slow the growing tide of criminal activity. On the other hand, appellate courts are more and more unwilling to disturb factual findings made by juries.

We believe, in looking at the totality of the evidence surrounding the shooting in the case as shown by the complete transcript, there is insufficient evidence to support the jury's verdict and the defendents' motion for directed verdict should have been granted. *Kupkowski* v *Avis Ford, Inc*, 51 Mich App 668; 265 NW2d 767 (1974), *aff'd* 395 Mich 155 (1975).

It is uncontroverted that when Arreola arrived at the scene, he was informed by a "hysterical woman" there was a "crazy man on the porch with a rifle." He understood from an officer that the man had forced his way into the house at gunpoint. He saw the man on the porch with a rifle held at ready pointed toward the front door of the house. He knew officers were arriving at the scene and he thought some of them and perhaps pedestrians might be on the street. After a time, when the decedent arose from the porch floor and pointed his rifle towards the street, the officer had to make a quick

decision. Should he wait and perhaps have an innocent civilian killed or wounded, or should he take an affirmative step to see if he could control the situation? He risked his life rather than possibly risking the life of another. He opened the door and yelled, "Police, drop your gun." As he testified, "In not a second . . . the man turned and spun toward me pointing the weapon in my direction."

At that time the officer honestly and reasonably believed he was in imminent danger of death or great bodily harm and that shooting was necessary to prevent the threatened danger. It is hornbook law that a person may defend himself from unlawful attack. *Kent* v *Cole*, 84 Mich 579; 48 NW 168 (1891), *People* v *Lennon*, 71 Mich 298; 38 NW2d 871 (1888), *People* v *Robinson*, 79 Mich App 145; 261 NW2d 544 (1977), *People* v *Green*, 113 Mich App 699; 318 NW2d 547 (1982). As was said in *Jenkins* v *Starkey*, 95 Mich App 685, 690; 291 NW2d 170 (1980):

> "A peace officer may use deadly force in defense of his own life, in defense of another, or in pursuit of a fleeing felon."

Even a civilian security guard may meet deadly force with deadly force. *People* v *Joeseype Johnson*, 75 Mich App 337; 254 NW2d 667 (1977). Reasonable and good faith belief in the necessity of police action is a defense to a civil rights claim. *Harris* v *Pirch*, *supra*, 686:

> "In § 1983 actions for damages defendants are entitled to a qualified immunity from liability based on a good faith belief in the propriety of their actions and reasonable grounds for that belief. *Procunier* v *Navarette*, 434 US 555; 98 S Ct 855; 55 L Ed 2d 24 (1978), *Scheuer* v *Rhodes*, 416 US 232; 94 S Ct 1683; 40 L Ed 2d 90 (1974). Therefore, when a court evaluates police conduct

> relating to an arrest, its guideline is good faith and probable cause . . . Thus, even though a police officer may not have chosen the wisest or most reasonable course of action, he will not be civilly liable if his conduct is based on a reasonable and good faith belief that it was necessary under the circumstances."

We recognize the jury found Officer Fitzgerald acted in "good faith" but found Arreola did not act in "good faith".

When did Arreola fail to act in good faith? Did he fail to act in good faith when he pulled the trigger on his service revolver? The evidence is clear he acted in a reasonable and good faith belief his life was imperiled by a "crazy gunman" who from a few feet away pointed a rifle at him. If Fitzgerald acted in good faith when he fired his firearm upon seeing the gunman aim his rifle at the other officer, then the person actually staring into the barrel of the rifle in good faith could also shoot defend himself.

The only other time the Commander might not have been acting in good faith was when he opened the front door and told Ealey, "Police, drop your gun." The evidence all supports this to have been a reasonable and good faith action by the officer. It is far easier for a jury and court long after the fact in the quiet contemplation of a jury room or in the ivory tower of a law library to determine what more prudent and practical action could have been taken, but a police officer often has but a short time to make decisions and make them he must. There is absoutely no evidence here that the officer opened the door in a bad faith attempt to force Ealey into a fatal confrontation. If such confrontation was the desire of the officer, he could have arranged it far more safely for himself by calling Ealey as the gunman lay

pointing his rifle at the house door with the officer in a darkened room behind him.

We note in *Zavala* v *Zinser*, in *Ross* v *Consumers Power Co*, 420 Mich 567; 363 NW2d 641 (1984), the plaintiff was shot and seriously wounded by participants in a fight. Two city police officers were nearby in a marked police vehicle and had not intervened in the fight. They had called for backup assistance. There the Supreme Court thought the police officers faced with a dangerous situation must be accorded a wide degree of discretion in determining what type of action to take to ensure the safety of individuals involved and the safety of the general public. This discretionary-decisional act in that case gave the officers governmental immunity.

We don't here hold that Michigan state-granted governmental immunity can protect a police officer from a rightly brought § 1983 civil right actions. We do rule the same basis of a defense to the civil right action is a basis for a self-defense or governmental immunity defense. Did the officer act in the good faith belief his action was necessary under the circumstances? Plaintiff in *Zavala* was an innocent member of the general public, one of the persons police are hired to protect. The police decided to delay his immediate protection by waiting for a backup. Plaintiff was seriously injured but could not recover from the officers. Here Arreola acted positively rather than waiting for more backup in order to protect officers and innocent civilians who might have been on the street. Now the gunman, rather than the innocent civilian, is struck by gunfire. Is the policeman then to be held liable? We think not. To hold him liable absent any evidence whatsoever of bad faith would be to send a message to police everywhere: "Don't risk your life to protect members of the general public, wait a while for more help. You policemen must decide if you want to

have an innocent person be wounded or killed with no responsibility to yourself or have the gunman be wounded or killed and have you be financially responsible to him or his estate."

The evidence contained testimony of other occasions when Arreola had been confronted by armed individuals in extremely tense and dangerous situations where he had reacted without injuring the assaulters even though random shots had been fired in anger and others threatened.

Having found in this transcript only evidence of a good faith and reasonable belief on behalf of Arreola, we must reverse the trial court's failure to grant a directed verdict. A panel of this Court in an unpublished and nonprecedential opinion has ruled the same in a similar case involving a civil rights action. *Nowak* v *George Potter, City of Detroit et al,* docket no. 78179, rel'd _____).

Defendants claim they have governmental immunity from tort liability. Plaintiffs concede the City of Detroit is not liable on the assault and battery charge because of governmental immunity, but insist the individual officer is.

Our appellate courts have struggled with and been divided about when governmental immunity protects. The latest case sets out a three-prong test. Employees such as police officers are immune from tort liability if and only if they are:

"a) acting during the course of their employment, and acting, or reasonably believe they are acting, within the scope of their authority;
"b) acting in good faith; and
"c) performing discretionary-decisional, as opposed to ministerial-operational acts." *Ross* v *Consumers Power Co, supra,* 592.

We hold Arreola was acting in the course of his employment and was and reasonably believed he was acting within the scope of his employment. In making the decision as to where to place men and what steps to take when Ealey, Jr. arose and pointed his rifle towards the street, Arreola was performing a discretionary as opposed to a ministerial act. At pages 659-660 in *Ross, supra,* the Court stated:

> "Police officers, especially when faced with a potentially dangerous situation, must be given a wide degree of discretion in determining what type of action will best ensure the safety of the individuals involved and the general public, the cessation of unlawful conduct, and the apprehension of wrongdoers. The determination of what type of action to take, *e.g.*, make an immediate arrest, pursue a suspect, issue a warning, await backup assistance, etc., is a discretionary-decisional act entitled to immunity."

As we have noted, the jury in answer to a special question found that the Commander had not acted in good faith. However, we have found no evidence of his lack of good faith, *supra*. In the total context of the trial we believe the genuinely-sympathy-provoking condition of the bereaved parents without a doubt outweighed in the jury's mind the precarious position of the officer who was suddenly confronted with an apparently mentally unstable gunman pointing a rifle directly at him. But sympathy for the surviving parents does not create a lack of good faith.

Defendants further allege the jury award was excessive, unfair, and based on improper consideration. Plaintiffs urge that this question is not properly before us. However, the trial court, at appellants' request, did consider the issue in deciding the delayed motion for a

new trial and the issue is preserved for appeal. *Froling* v *Bischoff*, 73 Mich App 496; 252 NW2d 832 (1977).

Defendants argue that plaintiffs sought no monetary damages for themselves for the violation of any constitutional right and a judgment for $240,000 was thus improperly beyond the addendum clause. *Phillips* v *Rolston*, 376 Mich 264; 137 NW2d 158 (1965). We have difficulty with the premises that plaintiffs can amend their pleadings after judgment and after the case is before the Court of Appeals, but the parties tried the case and went to the jury knowing plaintiffs were asking for a money judgment for civil rights violations. GCR 1963, 518.3 provides:

> "Except as to a party against whom a judgment is entered by default, every final judgment shall grant relief to which the party in whose favor it is rendered is entitled, even if the party does not demand such relief in its pleadings."

The decedent was 34 years of age. He had been unemployed and supported by general assistance. He had not lived with his parents for 14 or 15 years and had contributed but little financial support to his parents even when he briefly returned home during his adult years. As far as whether or not damages of $240,000 is so excessive as to shock the judicial conscience, *Bernette* v *Mackworth G Rees, Inc*, 109 Mich App 547; 311 NW2d 417 (1981), we need make no determination as we are reversing the granting of any judgment.

While not necessary to this opinion we do consider other issues.

Appellants claim the parents are not entitled to the judgment on the civil rights claim because they as parents were deprived of no civil right protected by federal statutes or constitution. This claim was presented in

Count VI, ¶ 47, of the amended complaint. This count was an allegation by all the plaintiffs,

> "That the conduct of the defendents and each of them, by their actions and conduct deprived the decedent of rights secured by the common law, the US Constitution and the State of Michigan Constitution including the right to due process with respect to the taking of his life and his liberty and the right to be free of unreasonable governmental interference."

There is a serious issue as to whether or not parents of a 34-year-old man who is living and has lived away from the parents' home nearly all of his life since he was 20 have been deprived of a federally-protected civil right by his death. There can be no question but that various courts have ruled parents have a protected civil right in the life and control of a child and the existence of the family relationship. *Stanley* v *Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972), *Caban* v *Mohammed*, 441 US 380; 99 S Ct 1760; 60 L Ed 2d 297 (1979), *Meyer* v *Nebraska*, 262 US 390; 43 S Ct 625; 67 L Ed 2d 1042 (1922), *Mattis* v *Schnarr*, 502 F2d 588 (CA 8, 1974) 574 F2d 1007 (1976).

However, these cases and others were not concerned, as our case is with a parent's civil rights in the life of an *adult* child who is not living with them or supporting them.

Jackson v *Marsh*, 551 F Supp 1091, 1094 (DC Colo, 1982), is a case dealing directly with the question raised here. In *Jackson*, as here, a city police officer shot and killed an adult son. The parents sued under 42 USC § 1983. The defendant's motion for summary judgment was granted because the court found the parents had no civil right protected by that statute in the life of an adult

son. *White* v *Talboys*, 573 F Supp 49, 51 (DC Colo, 1983), cites *Jackson, supra*:

> "Plaintiffs also allege that they were deprived of their constitutional right to a family relationship through the shooting of their son. . . . Now I am convinced from reading Judge Moore's opinion in *Jackson* v *Marsh*, 551 F Supp 1091 (1982), that the parents of the deceased are asserting a right that is not guaranteed by the constitution . . . Plaintiffs may only recover for deprivations of their own constitutional rights, and not the rights of another. . . .
>
> Plaintiffs' claims for relief based on a constitutional deprivation of their own rights due to their son's death, are dismissed. The right to the continued life of an offspring is not cognizable constitutional claim under § 1983."

Thus, the parents as such had no right to an award under the civil rights statute for the death of their son under the facts of this case.

This ruling leads us to the factual situation in our case. The special question asked and the answers of the jury on this portion of the case were:

> "18. Did defendant Commander Phillip Arreola violate plaintiff J. C. Ealey, Jr., deceased, constitutional rights?"
>
> "Yes."
>
> "19. What is the total dollar amount of plaintiffs' damages under their civil rights claim as against Commander Phillip Arreola and/or Police Officer Patrick Fitzgerald?"
>
> "$240,000."

We note the court instructed the jury:

> "The plaintiffs are entitled to damages to compensate them for the loss of their right to their child, if you believe they have sustained their burden. Parenthood is a substantive interest of surpassing value that is protected by the Constitution from deprivation without due process of law. Thus, you should award damages sufficient to compensate the plaintiffs for the loss of this right if you find the death of their child was unlawful."

This certainly would give the jury the right to consider the loss of the son as a substantive civil right loss to accrue to the parents. Such a right in the parents does not exist.

The special question relative to the amount of damages asked about damages to all of the plaintiffs, not just to the estate under the Wrongful Death Act. The judgment was awarded solely to the parents as individuals. They were entitled to no damages for violation of civil rights. What the jury might have awarded the estate is a matter of conjecture so this part of the judgment was erroneous.

Defendants have spent considerable time and energy in arguing and briefing their contention that plaintiffs failed to properly plead a cause of action under 42 USC § 1983. This is another issue we need not decide.

Appellants claim the trial court erred by granting attorney fees under 42 USC § 1983. If the plaintiffs had been entitled to the judgments as entered, we would affirm the grant of attorney fees. *Northcross* v *Board of Education of Memphis City Schools*, 611 F2d 624 (CA 6, 1979). Since plaintiffs are entitled to no judgment, they are entitled to no attorney fees.

The record demonstrates plaintiffs' assertions on their cross-appeal are without merit.

Judgments against City and Arreola must be reversed.

/s/ Thomas M. Burns
/s/ Rex B. Martin

Judge Roman S. Gribbs concurs in the result only.

/s/ Roman S. Gribbs

APPENDIX C

JUDGMENT ON VERDICT FOR PLAINTIFFS

(State of Michigan — Circuit Court — County of Wayne)

(Filed August 16, 1983)

(J. C. EALEY, JR., DECEASED, DAISEY EALEY, Personal Representative, and DAISEY EALEY and J. C. EALEY, SR., Plaintiffs, v CITY OF DETROIT, DETROIT POLICE DEPARTMENT, COMMANDER PHILLIP ARREOLA and POLICE OFFICER PATRICK FITZGERALD, jointly and severally, Defendants — CASE NO. 80 009 557 NO; Hon. Helene N. White)

At a session of said Court held in the City of Detroit, State of Michigan on August 16, 1983

PRESENT: HONORABLE HELENE N. WHITE
CIRCUIT COURT JUDGE

This matter having come on to be heard by the Court and a jury, and the jury having rendered a verdict in favor of the Plaintiffs, and this Court being fully advised in the premises:

1. IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff Daisey Ealey, Personal Representative of the Estate of J. C. Ealey, Jr., Deceased, recover from defendants Arreola and the City of Detroit the sum of $10,000.00 as damages under the assault and battery claim.

2. IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs Daisey Ealey and J. C. Ealey, Sr., recover from defendant Arreola the sum of $240,000.00, as damages under their civil rights claim.

3. IT IS FURTHER ORDERED AND ADJUDGED that interest on the $10,000.00 awarded in paragraph 1 above

is hereby assessed in the amount of $4,590.58 which represents interest accumulated from March 14, 1980 through August 16, 1983.

4. IT IS FURTHER ORDERED AND ADJUDGED that interest on the $240,000.00 awarded in paragraph 2 above is hereby assessed in the amount of $110,174.03 which represents interest accumulated from March 14, 1980 through August 16, 1983.

5. IT IS FURTHER ORDERED AND ADJUDGED that the Defendants, having rejected the mediation award of $100,000.00 are subject to the penalties under the mediation statute and that attorney fees of the Plaintiffs in the amount of $3,700.00 are hereby awarded to the Plaintiffs.

6. IT IS FURTHER ORDERED AND ADJUDGED that the Defendants, having rejected the mediation award of $100,000.00 are subject to the penalties under the mediation statute and that taxable costs of the Plaintiffs in the amount of $957.15 are hereby awarded to the Plaintiffs.

7. IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiffs having prevailed on their Civil Rights Claim under 42 USC 1983, are entitled to attorneys fees under 42 USC 1988 in the amount of $10,441.24.

/s/ HELENE N. WHITE
CIRCUIT COURT JUDGE

(Certification Omitted)

OPINION
Regarding Attorneys' Fees and Costs

(State of Michigan — Circuit Court — County of Wayne)

(Filed August 16, 1983)

(J. C. EALEY, JR., Deceased, DAISEY EALEY, Administratrix and DAISEY EALEY and J. C. EALEY, SR., Plaintiffs, v CITY OF DETROIT, DETROIT POLICE DEPT., COMMANDER PHILLIP ARREOLA and OFFICER PATRICK FITZGERALD, jointly and severally, Defendants — File No. 80 009 557 NO; JUDGE HELENE WHITE)

J. C. Ealey, Jr. died as a result of gunshot wounds inflicted by Commander Arreola and Officer Fitzgerald, employees of the City of Detroit, Detroit Police Department. His mother, as the personal representative of his estate, and with his father, individually, sued Arreola and Fitzgerald alleging negligence, assault and battery, breach of contract to provide police services, and violation of civil rights (42 USC § 1983), and the City of Detroit alleging negligent hiring, training and supervising, breach of contract, and violation of civil rights.

The case was mediated under LCR 403 for $100,000. Defendants rejected this evaluation and the case proceeded to trial. A jury returned a special verdict finding Arreola liable for damages for assault and battery in the amount of $10,000 and for violation of civil rights in the amount of $240,000. It also found that Fitzgerald acted in defense of Arreola and in good faith and that the City did not violate the plaintiffs' civil rights through its customs, policies or procedures.[1]

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[1] The Ealeys' other claims were not submitted to the jury, either because of a failure to state a claim upon which relief may be granted, a governmental immunity defense, or insufficient evidence.

The Ealeys have moved for attorneys' fees under both 42 § 1988 [2] and the court rule respecting mediation (Wayne County LCR 403), and for Costs Under Mediation and Taxable Costs.

I.

ATTORNEYS' FEES UNDER § 1988

Attorneys' fees are generally awarded to a party prevailing on a 42 USC § 1983 claim absent a showing of special circumstances which would render an award unjust. *Northcross* v *Board of Ed*, 611 F2d 624 (CA 6, 1979). In the instant case, the jury held against Arreola on theories of assault and battery, negligence and deprivation of civil rights (§ 1983). The court is aware of no special circumstances which would render an award of attorneys' fees unjust; Arreola and the City of Detroit, which has agreed to indemnify him, admit that the Ealeys are entitled to reasonable fees under § 1988.

The Ealeys seek attorneys' fees of $90.00 per hour for 126.5 hours of service performed by Attorney Shively and $65.00 per hour for 114.7 hours of service performed by Attorney Gardner. Arreola and the City assert that the request is excessive because services were duplicated by the two attorneys, the case was relatively simple, some services were not reasonably supportive of the successful claims, and some services were secretarial or paralegal in nature.

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2 "* * * In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

R.S. § 722; Pub. L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub. L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330.

Northcross, supra, sets forth an approach to the determination of appropriate attorneys' fees which involves multiplying the number of hours reasonably expended in support of the successful claim by an appropriate hourly rate. *Northcross, supra,* also enumerated special factors which may affect the number of hours considered reasonable and the proper rate to be applied

A. HOURS OF SERVICE

1. *DUPLICATION*

Hours should be cut for duplication, padding for frivolous claims. While no padding or frivolous claims are evident, duplication by the attorneys appears in the itemized list of services. Although the *Northcross* court chose to deduct a percentage of the total hours documented, here the list of services is sufficiently specific to allow the court to identify those services or billings which are duplicative.

Arreola and the City argue that granting Gardner, who assisted Shively at trial, fees for his time spent listening to the testimony at trial and noting the jury's response would be to require them to subsidize an educational experience. The court notes, however, that the presence of an attorney in the "second chair" is often necessary to the effective trial of a complex case or to keep track of complex or crucial testimony. In this case, Gardner's presence was reasonably necessary during the examination of Arreola and Fitzgerald, whose testimony was crucial, during the questioning of the witnesses he examined, Audrey Spears and Officer Pawlowski, and during closing arguments. The court will allow 14.5 hours trial time and strike 7 hours.

The court finds the following pre-trial services performed by Gardner were duplicative of those performed and billed by Shively:

HOURS	*BILLING CODE*	*SERVICE RENDERED*
.4	820616	Deposition of Off. Porter
.8	820517	Deposition of Sgt. Johnson
1.0	850528	Deposition of Off. Bessinger
.7	820616	Deposition of Off. Dragan
.5	820625	Deposition of Off. Cochran
1.5	820517	Deposition of Sgt. Pawlowski
.6	820616	Deposition of Off. Baxendale

While independent tasks may have been performed by each attorney in preparing for these depositions, (preparation time will be allowed for both attorneys), such preparation should have eliminated the need for the presence of both attorneys for the duration of each deposition. The court finds the attendence of both attorneys at Arreola's deposition was reasonably necessary to the preparation of the case because of the importance of his testimony.

2. *TEST JURY*

The Ealeys request attorneys' fees for time spent presenting the case to test juries and evaluating their reactions. Arreola and the City claim that the services listed are duplicated and not reasonably supportive of the successful claims. The Ealeys cite *Wouri* v *Concannon*, 551 F Supp 185 (D.C. Me. 1982), in support of their request and assert that presentation of the case to test juries was necessary and important to their success in that it assisted their attorneys in determining which factors seemed most relevant to jurors and which areas were complicated and difficult to understand.

The court finds that the case involved sensitive emotional issues which could affect jurors in various ways and that the use of a test jury to explore juror reactions was reasonably necessary to the successful result. Nevertheless, the needed information could have been obtained through presentation of the case to one test

jury by one attorney. Therefore, fees will be allowed for 2 hours of Shively's time spent preparing and presenting the case to one test jury and evaluating the results. A fee will be allowed for .5 hours of Gardner's time spent reviewing the results of the presentation. Additional hours directly related to the test jury will be disallowed: 2 hours billed by Shively, 7.4 hours billed by Gardner.

3. *REDUCTION FOR UNSUCCESSFUL CLAIMS*

While the *Northcross* court found it improper for the district court to reduce compensation because the plaintiffs did not prevail on "parts of issues", the United States Supreme Court recently addressed the issue of apportionment of attorneys' fees between successful and unsuccessful claims in *Hensley* v *Eckerhart*, 51 LW 4552 (5-17-83). The Court said that where a plaintiff is deemed to have prevailed even though he or she has succeeded on only some claims for relief, two questions are presented:

> "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" 51 LW at 4555.
>
> In *Hensley, supra*, the Court set forth the following considerations:
>
> "In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants — often an institution and its officers, as in this case — counsel's work on one claim will be unrelated to his work

on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved'. (Citation omitted) * * *

"* * * In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead, the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

"Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every assertion raised in the lawsuit. (Citation omitted.) * * *

"If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. * * *

"There is no precise rule or formula for making these determinations. The district court may

> attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified." 51 LW at 4555.

In the instant case, the Ealeys prevailed against Arreola on claims based on assault and battery, negligence and violation of civil rights. They failed to prevail against Fitzgerald on those same theories. They also failed to prevail on their claims against the City that its policies and customs violated § 1983 and that it was negligent in hiring, training and supervising Arreola and Fitzgerald.

The court finds that the claims against Arreola and Fitzgerald involved a common core of facts and were based on related legal theories. The interrelationship is evidenced by the jury's finding that Fitzgerald was acting in defense of Arreola. The hours expended in support of the claims against Fitzgerald were likely the same hours spent in support of the claims against Arreola. The attorney fee award should not, therefore, be reduced due to the failure to establish the claims against Fitzgerald.

The unsuccessful claims against the City of Detroit are more easily separated from the successful claims against Arreola. The claims of unconstitutional policies and customs and of negligence in hiring, training and supervising required the attorneys to inquire into and offer evidence regarding general police practices. This work is distinct from that required to gather and present proofs against Arreola and Fitzgerald.

The list of services does not reveal the nature of the work on sufficient detail to determine which services were primarily related to the claims against the City.

Accordingly, the number of hours otherwise allowed will be reduced by 30% to account for the limited success as to all claims.

B. FEE RATE

1. *HOURLY RATE*

The court adopts the *Northcross* approach to the determination of the per hour rate:

> "Again, turning to our mandate to award fees as is traditional with attorneys compensated by a fee-paying client, a scale of fees as is used by most law firms is appropriate to use in making fee awards pursuant to Section 1988. The use of broad categories, differentiating between paralegal services, in-office services by experienced attorneys and trial service, would result in fair and equitable fees.
>
> "In determining what the level of compensation for each category of service should be, the court should look to the fair market value of the services provided. In most communities, the marketplace has set a value for the services of attorneys, and the hourly rate charged by an attorney for his or her services will normally reflect the training, background, experience and skill of the individual attorney." *Northcross*, at 638.

With regard to Shively, the court believes an hourly rate of $80.00 for in-office work and $90.00 for trial work is consistent with the marketplace and reflects his training, background, experience and skill. With regard to Gardner, the court finds an hourly rate of $50.00 per in-office hour and $60.00 per trial hour is consistent with the marketplace given his relatively limited experience.

2. *CONTINGENCY FACTOR*

Northcross, supra, rejected the bonus multiplier factor in favor of building a contingency risk factor into the hourly rate of the attorney where warranted:

> "In many cases that [routine hourly] rate is not 'reasonable' because it does not take into account special circumstances * * * which affect the market value of the services rendered. Perhaps the most significant factor in these cases which at times render the routine hourly fee unreasonably low is the fact that the award is contingent upon success. An attorney's regular hourly billing is based upon an expectation of payment, win, lose or draw. If he or she will only be paid in the event of victory, those rates will be adjusted upward to compensate for the risk the attorney is accepting of not being paid at all . . . where the facts are strongly disputed * * * a substantial upward adjustment to compensate for the risk [is required] * * * The contingency factor is not a 'bonus' but is part of the reasonable compensation to which a prevailing party's attorney is entitled under § 1988." *Northcross,* 611 F2d at 638.

Although not considering this concept directly, *Hensley, supra,* appears to endorse it. In reviewing the facts of this case, especially the jury's finding of decedent's 75% comparative negligence, it is apparent that the Ealeys' attorneys accepted a risk of not being paid at all. Relying on *Northcross, supra,* as a factual and legal guide, the court will add an upward adjustment of 10% in the regular billing rate to account for the contingency factor. Thus, the hourly rates become:

Shively:	$88.00 in-office
	$99.00 trial
Gardner:	$55.00 in-office
	$66.00 trial

C. PARALEGAL SERVICES

Northcross, supra, contemplates the use of categories of services to arrive at equitable fees:

> "While necessary services performed by attorneys which could reasonably have been performed by less expensive personnel may be compensated at a lower rate than an attorney's normal billing rate, they should not be excluded altogether." *Northcross* at 637.

Shively and Gardner list several paralegal tasks which are properly compensated at a paralegal rate of $15.00 per hour:

Gardner:

2.0	811214	Motion filing
1.0	811222	Entering Order
.8	811222	Filing Amended Complaint
2.0	811228	Entered Order
2.0	820507	Serving Subpoenas
.6	820528	Filing Motion
1.2	820610	Entry of Order
.5	820716	Filing Mediation Summary
.5	820813	Filing Motion
1.0	810914	Enter Order

Shively:

3.0	820921	Prepare Subpoenas
1.0	830217	Prepare Subpoenas

Arreola and the City claim, citing *King* v *Greenblatt,* 560 F2d 1024 (CAl, 1977), that such tasks as the client interview and the reviewing of reports and correspondence is also paralegal work. *King, supra,* does not support this position with regard to these specific tasks and the court is persuaded that Gardner's legal expertise was reasonably necessary to the performance of these tasks.

II.
COSTS UNDER § 1988

42 USC, § 1988, does not expressly provide for the recovery of costs. Reimbursement of costs under § 1988 was narrowly constructed in *Northcross, supra,* to include expenses "incidental and necessary . . . to furnushing effective and competent representation." Reasonable photocopying, paralegal expenses, travel and telephone costs were held to be recoverable. In this case, the Ealeys have not submitted a request for such costs.

III.
ATTORNEYS' FEES UNDER MEDIATION

The Ealeys request that attorneys' fees be granted under § 1988 and the court rule respecting mediation. The fees requested under the mediation rule appear to include all services from the time of the mediation evaluation through trial. GCR 316.8 allows recovery "for services necessitated by the rejection of the panel's evaluation." GCR 316 does not, however, apply to litigation in Wayne Circuit Court. GCR 316.1(b) states: "This rule does not apply to the Circuit Court for the Third Judicial Circuit. In that court, mediation procedure is governed by Third Circuit Local Rule 403." LCR 403.16 provides:

> "Actual costs include those costs and fees taxable in any civil action and, in addition, an attorney fee for each day of trial in circuit court, determined by the trial judge in accordance with the fee prevailing locally."

There were 4-½ days of trial. The court finds that $600 per day is a reasonable fee for Shively. Gardner's presence was required for 2-½ days. A reasonable daily fee for his services is $400.

Arreola and the City argue that the court should not award attorneys' fees pursuant to both § 1988 and the mediation rule because doing so would result in a double recovery of attorneys' fees for the period of trial. The Ealeys argue that fees should be awarded under both provisions, notwithstanding the double recovery, in order to further the distinct policy behind each provision.

In *Northcross, supra,* the Sixth Circuit interpreted the Congressional intent behind § 1988 as follows:

> "This statute did more than simply enable the lower courts once again to award fees; rather than being an equitable remedy, flexibility applied in those circumstances which the *court* considers appropriate, it is now a *statutory* remedy and the courts are obligated to apply the standards and guidelines provided by the legislature in making an award of fees. * * *
>
> ". . . Congress expressly commands the courts to use the broadest and most effective remedies available to them to achieve the goals of the civil rights laws. The Report comments that in accordance with the law established under the 1964 Civil Rights Act, the prevailing party should 'ordinarily recover an attorney's fees unless special circumstances would render such an award unjust.'" *Northcross,* at 632, 633.

The court is persuaded that Congress would not consider the award of attorneys' fees under the mediation rule a "special circumstance" which would justify the court's refusing to award an attorney fee under § 1988 for time spent in trial. Rather, it is likely that the matter of a double recovery of fees due to a state court rule

LCR 403 and GCR 316 contain specific mandatory provisions for the award of costs and attorneys' fees when a party who has rejected a mediation panel's evaluation of the case fails to do at least 10% better than the mediation evaluation at trial. Under GCR 316, such a party must pay taxable costs plus a reasonable attorney fee for services necessitated by the rejection of the panel's evaluation. Under LCR 403, the party must pay taxable costs plus a reasonable attorney fee for each day of trial.

The mediation procedure was established to facilitate and encourage the pre-trial settlement of cases. A party who accepts the panel's evaluation is never assessed costs under the rule. A party who rejects the evaluation must do at least 10% better at trial in order to avoid paying actual costs to the opposing party. Implicit in the rule is the judgment that a plaintiff's rejection of an evaluation which is not more than 10% below what the plaintiff is ultimately awarded at trial and a defendant's rejection of an evaluation which is not more than 10% above the trial verdict is unreasonable *per se*. The rejection of an evaluation which later proves to be more than 10% above or below what the plaintiff ultimately recovers is deemed to be reasonable.

A defendant in a civil rights case knows that by settling the case for the mediation evaluation he can avoid paying attorneys' fees under § 1988 for post-mediation services performed on behalf of the plaintiff. If the plaintiff prevails at trial, § 1988 entitles him to recover additional attorneys' fees (additional to those included in the mediation evaluation) for attorneys' services subsequent to mediation. Thus, a defendant in a § 1983 suit has an incentive to accept a reasonable mediation evaluation even without applying the mediation provisions regarding the payment of attorneys' fees. In this sense, the

policy behind the mediation rule is served even without awarding double attorney's fees for trial.

While it is clear that the rule is intended to encourage both sides to accept reasonable mediation evaluations, it is less clear whether the provisions regarding attorneys' fees are intended to penalize the unreasonable party or to compensate the reasonable one.

If the purpose of the rule is to compensate — in this case to compensate the Ealeys who were required to try a case where they received a verdict of far more than 110% of the mediation evaluation — that purpose is already served by the award of attorneys' fees under § 1988. A double award is not necessary to accomplish the goal of compensation.

If the purpose of the rule is to penalize the unreasonable party, that objective is not necessarily accomplished by the award of compensatory attorneys' fees under § 1988.

In *Wood* v *D.A.I.I.E.*, 413 Mich 573 (1982), the Michigan Supreme Court held that the statutory provision which requires no-fault insurers to pay 12% interest on benefits from the time the benefits are overdue should be applied along with the statutory provision for the payment of interest of 6%, now 12%, on judgments beginning from the time the complaint is filed, so that a prevailing plaintiff-insured is entitled to recover interest of 12% from the time the benefits are overdue to the time the complaint is filed, and interest of 24% from the time the complaint is filed until the judgment is satisfied. The Court explained that the purpose of the no-fault interest provision is to penalize the recalcitrant insurer while the purpose of the prejudgment interest statute is to compensate the plaintiff for delay in obtaining money found to be owing. The two policies are distinct and are not mutually exclusive.

The Court could have held that the no-fault 12% interest provision is a penalty which begins to accrue

when benefits are overdue, and that since the purpose of the prejudgment interest statute — to compensate at a rate of 6%, or 12% — is achieved through application of the no-fault penalty provision alone, the plaintiff should not be granted a windfall through the application of both provisions and the award of interest at a rate of 18% or 24%.

The Court held, however, that because the purpose of one provision is to compensate and the other is to penalize, the provisions are not mutually exclusive and both should be applied.

Applying the rational of *Wood, supra,* to the instant case, if the purpose of awarding attorneys' fees under the mediation rule is to compensate the reasonable party, a double award would be superfluous since that objective is accomplished through application of § 1988 alone. If, however, the purpose of the award is to penalize the unreasonable (recalcitrant) party, that policy is distinct from the compensatory policy of § 1988 and is not furthered to its fullest by awarding fees solely under § 1988 and without regard to whether the recalcitrant party's conduct was reasonable under the mediation rule.

While it is unclear from GCR 316 whether the provisions regarding the payment of attorneys' fees are intended to compensate or penalize, LCR 403 more clearly states a purpose to penalize.

Under LCR 403, the reasonable party is not awarded fees for all services made necessary by the unreasonable party's rejecting the evaluation, but, rather, is awarded an attorney fee for each day of trial. If the policy of the rule is to compensate, it fails with respect to all pre-trial services performed after the unreasonable party's rejection of the mediation evaluation. The attorney fee under LCR 403 thus appears to be a penalty, imposed upon

the party who has unreasonably rejected the mediation evaluation for each day of the court's and opposing counsel's time spent in the trial of a case which the unreasonable party should not have insisted upon trying.[3]

Additionally, LCR 403.15(b), concerning the procedure to be followed where the mediation evaluation is $10,000 or less states, "The *penalty* provisions still apply to cases which are removed." (Emphasis added). Thus, LCR 403 makes explicit what is generally understood in the practice — that the mediation provisions requiring that attorneys' fees be paid in certain circumstances are intended to penalize the party who unreasonably refuses to accept the panel's evaluation.

Since the award of a reasonable attorney fee for each day of trial will penalize Arreola for not accepting a reasonable mediation evaluation and encourage other defendants in the same position to accept such an evaluation, and the award of double attorneys' fees for trial does not violate the spirit of either § 1988 or LCR 403, the court will award an attorney fee under both § 1988 and LCR 403, the former award being to compensate the Ealeys for their actual fees, the latter award being only nominally an attorney fee but truly a penalty assessed against Arreola for refusing the $100,000 mediation evaluation, the measure of the penalty being a reasonable attorney fee for each day of trial.

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[3] In cases where both parties reject the mediation evaluation but one party fails to do more than 10% better at trial, it can be argued that there is no reason to penalize the unreasonable party by requiring him to pay the other party's trial attorney's fees because the other party rejected the evaluation and therefore a trial would have been necessary even if the unreasonable party had accepted the evaluation. While this argument has appeal in logic, it ignores the real process by which cases are settled. One party's acceptance of a mediation evaluation often results in the other party's settling for the amount of the evaluation even after that party has formally rejected the evaluation.

IV.
COSTS UNDER MEDIATION

Wayne County Local Court Rule 403.16 provides that actual costs under the mediation provision include "those costs and fees taxable in any civil action". GCR 526 and MCLA 600.2401 *et seq.*, govern such costs. Arreola and the City have not objected to the proposed bill of costs, but, nevertheless, the court is bound to determine which items are proper under the above provisions. Accordingly, the court awards the following costs:

212.50	Rehabilitation Consultants Economic Experts
60.00	Filing and Jury Fee
91.70	Service of Process
20.00	Motion Fees
90.00	Subpoena Fees for Trial
10.70	Wayne County Sheriff
90.00	Witness Fees
81.00	Service of Process
20.00	Witness Fees — Eric Burdett
5.00	Wayne County Court Records
10.00	Judgment
185.25	Deposition of Paul Dragan
81.00	Great-Lakes Process Service
957.15	

V.
CONCLUSION

Attorney's fees under 42 USC § 1988:

SHIVELY	*HOURS*	*LESS 30%*	*RATE*	*FEE*
Non-trial	86.4	60.48	$88/hr.	$ 5,322.24
Trial	26.5	18.55	$99/hr.	$ 1,836.45
Paralegal	4.1	2.87	$15/hr.	$ 43.05
GARDNER	*HOURS*	*LESS 30%*	*RATE*	*FEE*
Non-trial	63.7	44.59	$55/hr.	$ 2,452.45
Trial	14.5	10.15	$66/hr.	$ 669.90
Paralegal	11.6	7.81	$15/hr.	$ 117.15
				$10,441.24
MEDIATION PENALTY		*DAYS*	*RATE*	*FEE*
SHIVELY		4.5	$600.00	$ 2,700.00
GARDNER		2.5	$400.00	$ 1,000.00
				$ 3,700.00

TAXABLE COSTS: $957.15